

1 expert who testified there, who is going to  
2 testify again here and MASN had cut against  
3 us. Well, now it's been reversed by the  
4 Commissioners of the FCC in a decision that is  
5 a binding decision unless it's reversed by a  
6 higher Court, which could always happen. But  
7 right now, that is a ruling by the  
8 Commissioners, highest level you can get in  
9 the FCC. And that case says couldn't be  
10 clearer on the cost benefit test. It analyzed  
11 the situation. Your Honor may be familiar  
12 with another aspect of MASN. I think you're  
13 familiar with some of this already.

14 Time Warner was the cable company  
15 involved there and Time Warner alleged in that  
16 case that it had done a cost benefit analysis  
17 of the network that was claiming it was  
18 discriminated against. And based on its cost  
19 benefit analysis it didn't think the  
20 programming was worth putting on the air.

21 Now interestingly, in the MASN  
22 case, there was no contemporaneous

1 documentation to support Time Warner's  
2 position and the lower level decisions in MASN  
3 had ruled we're not going to trust the  
4 decision. We don't think we're going to  
5 credit it because it wasn't contemporaneously  
6 documented.

7 The Commission reversed and held  
8 that there was no reason to doubt it just  
9 because it wasn't documented and that that was  
10 the reason given by the witnesses for why they  
11 had not carried the channel and that was a  
12 perfectly valid reason to give for a business  
13 because businesses are supposed to make money.  
14 They're supposed to be run for a profit, not  
15 for a loss. And cost benefit is what you're  
16 supposed to do.

17 Now Your Honor, you're going to  
18 see in a second this case is so much stronger  
19 for my client. We have tons of  
20 contemporaneous documentation. Mr. Phillips  
21 hates these documents. They've tried to keep  
22 some of them out of the record. They hate

1       them so much. In which our people documented  
2       not once, not twice, three times, my client  
3       analyzed and documented the cost benefit  
4       analysis for why Tennis Channel was not worth  
5       being carried.

6               In fact, two of the times they did  
7       that analysis, they actually analyzed Tennis  
8       Channel as if they owned a piece of it. And  
9       so, how is that possible, sir? It's possible,  
10      because I think Your Honor will remember there  
11      are things called MFNs, Most Favored Nation  
12      clauses. Tennis Channel and I'm going to get  
13      into this in my prepared comments in a bit  
14      more detail.

15             The Tennis Channel made some  
16      offers to some other cable companies along the  
17      years of what's called equity for carriage,  
18      where in order to get carriage, they gave  
19      stock in themselves to the distributor.  
20      Because they did that, they had to bring those  
21      offers to my client which was there in the  
22      marketplace earlier under an MFN. My client

1 then analyzed the stock position, the value of  
2 Tennis Channel as if they owned that equity  
3 share just the way they're alleged to have  
4 done for their own affiliates. Straight up.  
5 we have 10-page decks with the slides of the  
6 analysis itself. Each analysis shows it's  
7 underwater. The costs outweigh the benefits.  
8 It doesn't fly the channel. It doesn't fly.

9 JUDGE SIPPEL: Now when you say  
10 it's underwater, could you just be a little  
11 more specific on that?

12 MR. CARROLL: I can and I have --

13 JUDGE SIPPEL: The losses, the  
14 expenses are greater than the income?

15 MR. CARROLL: The costs, when you  
16 combine the projected benefits including  
17 greater distribution that they wanted from our  
18 client when you projected those benefits and  
19 you compared them to the costs they wanted for  
20 their programming, because remember, Your  
21 Honor, the fundamental economic piece at the  
22 heart of this is that for them to get greater

1 distribution they are charged by subscriber.  
2 So each time they add a subscriber my client  
3 pays more money. Each time they add millions  
4 of subscribers, my client pays millions times  
5 more money.

6 In this case, they're asking Your  
7 Honor to add many millions of subscribers  
8 which will add, I won't add the precise  
9 numbers in the public session, many millions  
10 of cost to my client. My client is comparing  
11 those costs and there's no claim that my  
12 client did anything wrong here. Those are the  
13 right costs. My client did an equity value.

14 The equity value they did, my  
15 client was so careful they actually called up  
16 and said to Tennis Channel give us your  
17 documents, your business records so we get it  
18 right. It's called due diligence. We want to  
19 do good due diligence here. And they ran the  
20 numbers and then to make it even better, I  
21 mean I couldn't make this up -- if I were a  
22 lawyer who wanted to have the best argument,

1 I couldn't make up an argument better than  
2 this and this is exactly what happened. I'm  
3 not making it up.

4 In addition to that, after my  
5 client did the analysis, they called them up  
6 and they gave them an explanation for why the  
7 cost benefit analysis was not a green line for  
8 an investment. Why it showed that the cost  
9 would outweigh the benefits. They explained  
10 it to them. They did that in 2006. In 2007,  
11 they did it again.

12 And then we get to 2009 and it's  
13 interesting to me that in their submission to  
14 Your Honor, Tennis Channel omits any reference  
15 to 2006 MFN or the 2007 MFN. You won't find  
16 it referenced in their submissions. You won't  
17 find it referenced by Mr. Phillips this  
18 morning. It's a really bad fact for them,  
19 both of them, because they came to us,  
20 presented an ownership interest and said, hey,  
21 evaluate us. Tell us what you think. And we  
22 did it, with their numbers.

1                   Now I'm going to show you with the  
2                   first witness today that their numbers they  
3                   actually gave us were kind of inflated in a  
4                   couple of respects. They actually gave us  
5                   inflated numbers to try and sell the deal to  
6                   us, but notwithstanding that, we got to the  
7                   right result and we did the analysis.

8                   In 2009, it plays out one more  
9                   time. This time they come with us with a  
10                  straight offer. It doesn't include the equity  
11                  that they've used before with other  
12                  distributors. We do the analysis again.

13                  And it's almost as if to say how  
14                  many times do we have to do this for these  
15                  guys? And we still didn't refuse. My client  
16                  could have said in 2009, this would have been  
17                  maybe closer to discrimination. We've done  
18                  this before guys. We're really tired of this.  
19                  How many times do we have to tell you?

20                  No, my client did it again. And  
21                  in 2009, in addition to running the cost  
22                  benefit test, my client also checked with the

1 field, the people out in the various regions  
2 close to the subscribers and said hey, are you  
3 getting a lot of phone calls with people  
4 wanting to have Tennis Channel because it's  
5 not carried on the stations? Because my  
6 client wanted to know, if there are a lot of  
7 people sitting up at night tired of watching  
8 bull riding or something, going I wish I had  
9 tennis, they keep a record of some of those  
10 calls sometimes. And so my client actually  
11 called out to the field and did a demand check  
12 like that.

13 JUDGE SIPPEL: When you said to  
14 the field, you mean to Comcast offices out in  
15 the field?

16 MR. CARROLL: Yes, to Comcast --  
17 yes, they have four geographic regions around  
18 the country and then they're divided with  
19 offices in each one. They called out to the  
20 executives in each of the four regions and  
21 said check with your people and get back to  
22 me, are you getting a lot of demands from your

1 subscribers? Are there a lot of people here  
2 who are asking about Tennis Channel or  
3 complaining that they can't get Tennis  
4 Channel? Everybody says no.

5 So as a business matter, only  
6 somebody who wanted to lose money would do  
7 what they're asking us to do. And their  
8 position in this case which I would submit --  
9 I say this with all due respect, very fine  
10 lawyers on the other side -- but it is a  
11 ridiculous position. Their position to this  
12 Court is that it is discrimination from my  
13 client not to lose hundreds of millions of  
14 dollars or whatever by putting up a channel  
15 that has no business being there and would  
16 lose us money for our shareholders.

17 And with all due respect, we're  
18 not running a charity organization. And I  
19 don't think the FCC rules require us to run a  
20 charity organization. They say and Mr.  
21 Phillips conceded this in his opening  
22 properly, "The FCC rule Section 616 does not

1 outlaw vertical integration." It doesn't say  
2 you can't vertically integrate entities. It  
3 doesn't say if you build them you have to go  
4 lose money on your businesses. All it says is  
5 don't discriminate on the basis of  
6 affiliation. Call them straight. Call the  
7 strikes and the balls the way you're supposed  
8 to call it for a business and we did. We did  
9 exactly that three times.

10 The last point quickly and then  
11 again I want to --

12 JUDGE SIPPEL: When you say it was  
13 done three times, does this have to do with  
14 new MFNs of what were the occasions for doing  
15 it three times?

16 MR. CARROLL: I have a time line  
17 that I'm going to give you that will lay this  
18 out in detail. There are two satellite  
19 companies that they feature as being two of  
20 the MVPDs that are the ones you should look  
21 most to, DirecTV and Dish. Both of those  
22 deals that Tennis Channel got and the

1 distribution they got for both of those,  
2 DirecTV gives them something like  
3 distribution, penetration it's  
4 called. That's the percentage of your  
5 subscribers out there who are getting  
6 distribution of the programming. And the  
7 higher the number is, the more you're  
8 distributing it and making it available. It  
9 doesn't mean everybody is watching it, but it  
10 means it's out there broadly for them to see.

11 JUDGE SIPPEL: Well, the  
12 advertisers like those numbers, right?

13 MR. CARROLL: Yes, the advertisers  
14 to be sure, because the more something is  
15 national or international, the more appeal it  
16 has. No dispute from my side on that.

17 JUDGE SIPPEL: for  
18 Direct and I guess -- what was Dish? I can go  
19 back --

20 MR. CARROLL: Dish is about

21 .

22 JUDGE SIPPEL: About .

1 MR. CARROLL: Each of those deals,  
2 they could not get a deal done with either one  
3 of them until they offered them equity. The  
4 way they got those deals with those two  
5 companies was they said, okay, you won't carry  
6 us so far, so how about if we give you stock?  
7 And they gave them a lot of stock. I won't  
8 use the percentage right here, but they gave  
9 them a lot of stock. So that ironically,  
10 Tennis Channel is now owned by -- in large  
11 part, by two of the distributors.

12 Now Your Honor, the idea that they  
13 would promote those two as the examples that  
14 should be compared to my client in a straight  
15 non-equity deal is ridiculous. The way they  
16 got that distribution was by offering  
17 ownership in themselves. They bought it.  
18 They bought the distribution.

19 Each of those, Your Honor,  
20 generated an MFN, each time.

21 JUDGE SIPPEL: From who?

22 MR. CARROLL: From Tennis Channel

1 to my client. And in each instance they were  
2 required to come to my client and say okay,  
3 analyze the equity, we're offering you similar  
4 terms, analyze the equity, analyze the cost  
5 and it's on each of those times that my client  
6 analyzed the equity as if it owned it, as if  
7 it was an owner of the business and valued the  
8 cost and the benefits.

9 JUDGE SIPPEL: So the MFN was --  
10 let me put this the right way. When Tennis  
11 Channel had these favorable numbers available,  
12 they went to -- from DirecTV and Dish, they  
13 went to Comcast and said would you renegotiate  
14 our MFN and take a look at us again because we  
15 want a better deal?

16 MR. CARROLL: And they said, they  
17 basically offered the same deal. They said  
18 here we're going to offer you stock in us too,  
19 and here's the prices we're going to offer you  
20 and analyze it. And my client did, each time.  
21 And each time my client came back with a cost  
22 benefit and said nope, it's not worth it. And

1 explained it to them. And each time we got no  
2 disagreement from them about how we had done  
3 the cost benefit analysis. There will be no  
4 witness from Tennis Channel who is going to  
5 say they made a mistake or they didn't do it  
6 fairly or they shouldn't have been doing it.  
7 Basically, his position in the argument this  
8 morning is that we shouldn't do a cost benefit  
9 analysis. And that's ridiculous. We did the  
10 analysis.

11 And then Your Honor, the final  
12 offer, which is the one that I guess they're  
13 suing on in this case, because they didn't sue  
14 us after the 2006 and 2007 decisions, they  
15 didn't bring a claim, never claimed that there  
16 was discrimination by us in each of those  
17 analyses that we did in 2006 and 2007. The  
18 one we sued on is then they come in 2009 with  
19 another one. This time it has no equity piece.  
20 They're not offering us any equity. And they  
21 offer us a deal that would have greater  
22 distribution at a cost and we analyze the cost

1       again.

2                       Three times we go through this  
3       exercise. And you know what? My client would  
4       do it, I suppose each year. This is one of  
5       those things it's not clear under the rules  
6       how many times a channel gets to come after  
7       you and keep making new proposals, but the  
8       point on my side is my client has never said  
9       no, we will not analyze it. Each time my  
10      client has said okay, give us all the  
11      information we need and we'll do an analysis.

12                   JUDGE SIPPEL: Does your client --  
13      I'm not asking you to disclose anything of  
14      what your client thinks, but is there an  
15      element of some duty here that there's some  
16      kind of a duty felt to continue negotiations?

17                   MR. CARROLL: I think, frankly, in  
18      their business now with everybody wanting  
19      something from them, I mean they get pitched.  
20      Probably, Your Honor, two or three channels a  
21      day probably come in and say, "Carry us."

22                   So I think my client is well

1       advised, too, to be careful and to give each  
2       one a fair review, especially somebody that  
3       they have a relationship with and they have a  
4       relationship with Tennis Channel. We were one  
5       of, Your Honor, the first ones to carry them.  
6       That's another irony in this case. We carried  
7       them before DirecTV, before Dish, and they  
8       didn't have to offer us equity to get us to  
9       carry them.

10               And we carried them on a sports  
11       tier, Your Honor, because that's what they  
12       wanted at the time. That was their business  
13       plan back in 2005. They wanted the deal that  
14       we gave them. They loved the deal and then  
15       they changed their mind a few years later and  
16       decided they needed to go a different way for  
17       their business. And that's why now they want  
18       to change the deal that they had done with us.

19               They argue that the FCC rules  
20       permit them to change a contract like this.  
21       And, frankly, it's an unsettled area out there  
22       in the law as to what extent a contract

1 certainly relevant, a relevant piece of  
2 information, that I think has to be considered  
3 when you're deciding whether there's  
4 discrimination. That is if somebody has a  
5 contractual right to something, it's not  
6 discrimination for them to value that right at  
7 least. It's probably also the case that the  
8 contract couldn't preempt or supersede FCC  
9 laws.

10 So I think the best I would say on  
11 that issue is you have to make an  
12 accommodation. You can't ignore the fact that  
13 we had a contractual right given to us in 2005  
14 which we did which they were very happy with  
15 until they changed their mind.

16 Now I'm going to touch one other  
17 issue and then I'm going to hand Your Honor  
18 something that I had planned to bring here  
19 today that I'll spend five or ten minutes on  
20 and unless Your Honor has questions I think we  
21 can get to the first witness.

22 Substantial similarity, similarly

1       situated, was another issue that was touched  
2       on. You know when I try to explain as I  
3       sometimes do my children are not often  
4       interested in my work, but I try to make --

5               JUDGE: With four daughters you  
6       really do have a lot going against you.

7               MR. CARROLL: I really do and I'll  
8       be working for a long time.

9               JUDGE: Wait until you get to the  
10      weddings.

11              MR. CARROLL: But they say to me,  
12      "So what's this case about?"

13              And I say, "Well, there's tennis  
14      and they're arguing that, this Tennis Channel  
15      is arguing that, they should be treated  
16      exactly like Golf and Versus." And I have to  
17      explain to them what Versus is. I said,  
18      "Versus has these kind of violent sports." My  
19      client would want me to put that a different  
20      way probably, but cage fighting, bull riding,  
21      hockey.

22              And they say, "Well, why would you

1       have to do that?"

2                   And I said, "There are some rules  
3       that you have to follow?"

4                   And they say, "What are their  
5       arguments?"

6                   And I say, "They claim that it's  
7       kind of the same."

8                   And they start laughing at me and  
9       they say, "You're going to sit there as  
10      lawyers and try to argue that tennis is like  
11      golf?"

12                   Now at one level we all have -- At  
13      the common sense level, you look at it and you  
14      look at the equipment and you go "It's not  
15      like it at all." And that's not the test  
16      though. I'm not claiming that they have to  
17      use the same implements in order to be legally  
18      treated the same. But it's a good starting  
19      place.

20                   Because if you look at the people  
21      who play them, the hockey players aren't the  
22      people who are playing tennis, you know.

1 They're not out there in their nice whites on  
2 the tennis courts. The hockey guys are a  
3 different group in their sweatshirts and it's  
4 just a different group.

5 So at a gut level common sense  
6 tells you there's an awful lot different about  
7 these things to start with and a lot of  
8 reasons to think that the audiences are  
9 different. But you don't have to take my word  
10 for it. We have experts who are going to, as  
11 they always do, disagree. The experts are  
12 going to argue over whether these things are  
13 similarly situated and they're going to have  
14 at it.

15 I would submit to Your Honor the  
16 best way to decide this is just look what  
17 Tennis Channel itself wrote in its own  
18 documents back at the time before they knew  
19 they had this litigation. Because often what  
20 people write before they know they're going to  
21 be in court is the most interesting stuff.  
22 You get a real insight into what do they

1 really think before they know they're going to  
2 be arguing in court. What are they really  
3 saying about things?

4 I've got some documents and  
5 they're featured. I won't get into the tales  
6 of them I suppose. But you're going to see in  
7 Tennis Channel's own documents in black and  
8 white, clear as can be, acknowledgments that  
9 the viewership audience for golf, hockey, all  
10 these other activities you heard about is much  
11 larger than it is for tennis.

12 You're going hear that the  
13 viewership is much different as to eight.  
14 There will be a bar chart I'm going to show  
15 you. Stop me, but I think we can do bar  
16 charts at least on statistics for the sports.  
17 Golf -- this hurts a little bit for me to say  
18 because I fall into this bracket -- is in the  
19 50 to 55 year old bracket. It's the kind of  
20 older generation activity that people watch.  
21 That is when you look at the median age there  
22 are people who follow this for a living. They

1 go out and they poll and they find out what's  
2 the median age of the person who is viewing  
3 our programming.

4 Golf is old guys like me. It's a  
5 slow game and it takes a long time. And we  
6 fall asleep watching it I guess.

7 Versus is the hockey crowd. And  
8 Versus comes in at a different group much  
9 younger than golf. In fact, Versus comes in  
10 in the 36 to 40 year old group, the 30 some  
11 things if you will.

12 Tennis is in the 40s, 41 to 45.

13 JUDGE: I have a neighbor of mine  
14 who is 82 and he plays every morning.

15 MR. CARROLL: Well, there you go.  
16 He's on that calculation somewhere.

17 JUDGE: You said it was 41 to what  
18 is it?

19 MR. CARROLL: Forty to 45. Forty-  
20 one to 45 is where tennis comes in for its  
21 median age of its viewership.

22 And this information is coming

1 from the experts on each side. There's not  
2 much dispute about it. They're going to argue  
3 over the significance. But what you're going  
4 to hear is that advertisers are targeting  
5 markets that they pick products based on the  
6 age of the person watching it.

7 My programming it's what's that  
8 stuff. Grecian Formula for graying hair and  
9 in the 36 to 40 year old, I don't know what it  
10 is. Beer maybe. But they're different  
11 products that are targeted for these things.  
12 They're different as common sense would lead  
13 to believe. They're different.

14 Gender. Now remember I have four  
15 daughters on this one. So this one I'm  
16 slightly conflicted in it. But it's a fact  
17 from Tennis Channel's own documents. Tennis  
18 Channel unlike the other sports appeals and is  
19 targeted much more to women than the other  
20 sports, ice hockey.

21 JUDGE: Say that again.

22 MR. CARROLL: Tennis Channel for

1       its viewership appeals more and is targeted  
2       more to women than the other sports are. A  
3       lot of the other sports are really very hard  
4       core men, cage fighting, bull riding.

5               JUDGE: But does the fact that the  
6       women professionals are sometimes more  
7       exciting than watching the men professionals?

8               MR. CARROLL: Ah. That gets into  
9       the age issue, too, probably.

10              JUDGE: No, it's different. I  
11       mean the women -- I know it's not an equal  
12       thing, but it's practically equal now I  
13       believe to the extent that I follow this  
14       stuff. They've been .upping the ante on the  
15       winnings.

16              MR. CARROLL: Absolutely.

17              JUDGE: And I mean it's a pretty -  
18       -

19              MR. CARROLL: Yes, it is. And  
20       it's a good thing. And I'm not arguing  
21       against it. I think it's great that tennis  
22       appeals to women. But it's not the same as

1       hockey and golf. That's the point because  
2       remember. This is a discrimination case.  
3       This is a case in which they have to show that  
4       they are similarly situated to us and that  
5       they appeal to the same viewers, that they  
6       appeal to the same gender, that they appeal to  
7       similar age groups.

8               JUDGE: Okay.

9               MR. CARROLL: And my point is  
10       simply to show they're quite different and  
11       these differences are meaningful. And it's  
12       not discrimination for people to take account  
13       of these differences when they're making  
14       programming decisions.

15              They're quite proud of the fact  
16       that they appeal more to women. In fact, when  
17       they made the pitch to us in 2009 they  
18       actually featured a woman with a pocketbook as  
19       the core audience for Tennis Channel. I  
20       promise you that picture has never been  
21       featured for the core audience for Versus  
22       hockey, bull riding and cage fighting. Very

1 different audience.

2 Now I wanted, Your Honor, if I  
3 could. I put together a small binder of  
4 exhibits. I'm not going to hand it out  
5 publicly. I would like to just offer it to  
6 the Court and to the other side.

7 This is based on -- In fact, most  
8 of them are exhibits themselves in the case  
9 that have been admitted. A few of them are  
10 demonstratives that are based on the exhibits  
11 in the case. And I put together a little time  
12 line. I'd like to spend about five minutes on  
13 it. It's a nice, small package of materials  
14 that are sort of the key materials for us.

15 JUDGE: Are these the -- Now are  
16 these being offered as items for your -- These  
17 are part --

18 (Off the record comments.)

19 JUDGE: Mr. Carroll, these are  
20 part of your opening statement. That's what  
21 they're reading off it for.

22 MR. CARROLL: They are part of my